Supreme Court, U. S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-1350

JOSEPH J. GARIBALDI, LEO S. GARIBALDI
and LEONA D. GARIBALDI,
Petitioners,

vs.

EDITH CANVIN, as Administratrix of the Estate
of Theresa Garibaldi, Deceased, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the Court of Appeal of the State of California
Third Appellate District

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INTRODUCTION

Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California, Third Appellate District, entered on January 5, 1977.

OPINION BELOW

The opinion of the Court of Appeal of the State of California, Third Appellate District, is printed in Appendix "A" hereto and is not reported in the official reports.

JURISDICTION

The judgment, printed in Appendix "A" hereto, which is sought to be reviewed is dated January 5, 1977 and was filed on that same date.

A rehearing by the Court of Appeal of the State of California, Third Appellate District, was denied on January 25, 1977 (Appendix "C" hereto). A hearing in the California Supreme Court was denied on March 3, 1977 (Appendix "D" hereto).

The jurisdiction of this court is invoked under Section 1257(3) of Title 28 of the United States Code.

QUESTIONS PRESENTED

(1) Were Petitioners deprived of their property without due process of law and denied the equal protection of the laws where the Court of Appeal of the State of California, Third Appellate District, refused to decide the issue raised by Petitioners on their appeal, to-wit: that the attorney for the Respondent Garibaldis perpetrated a fraud upon the probate court and these Petitioners and thereby acquired legal title to real property for his clients, i.e., the Respondent Garibaldis, which was rightfully vested in Petitioners?

CONSTITUTIONAL PROVISIONS INVOLVED

Federal Constitution:

"Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S.C.A. Const. Amend. XIV §1, 33." (Only Section 1 is deemed pertinent to this issue)

California Constitution, Article 6, §4b:

"The District Courts of Appeal shall have appellate jurisdiction on appeal from the superior courts (except in cases in which appellate jurisdiction is given to the Supreme Court) in all cases at law in which the superior courts are given original jurisdiction; also, in all cases of forcible or unlawful entry or detainer (except such as arise in municipal, or in justices' or other inferior courts); in proceedings in insolvency; in actions to prevent or abate a nuisance; in proceedings of mandamus, certiorari, prohibition, usurpation of office, removal from office, contesting elections, eminent domain, and in such other special proceedings as may be provided by law; also, on questions of law alone, in all criminal cases prosecuted by indictment or information, except where judgment of death has been rendered.

"The said courts shall also have appellate jurisdiction in all cases, matters, and proceedings

pending before the Supreme Court which shall be ordered by the Supreme Court to be transferred to a District Court of Appeal for hearing and decision. The said courts shall also have power to issue writs of mandamus, certiorari, prohibition and habeas corpus, and all other writs necessary or proper to the complete exercise of their appellate jurisdiction. Each of the justices thereof shall have power to issue writs of habeas corpus to any part of his appellate district upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself or the District Court of Appeal of his district, or before any superior court within his district, or before any judge thereof."

STATUTES INVOLVED

California Civil Code §2330:

"An agent represents his principal for all purposes within the scope of his actual or ostensible authority, and all the rights and liabilities which would accrue to the agent from transactions within such limit, if they had been entered into on his own account, accrue to the principal."

California Civil Code §2338:

"PRINCIPAL'S RESPONSIBILITY FOR AGENT'S NEGLIGENCE OR OMISSION. Unless required by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by each agent in and as a part of the transaction of such business, and for

his willful omission to fulfill the obligations of the principal."

STATEMENT OF CASE

Petitioners commenced an action in the trial court to impose a constructive trust on certain real property which Respondent Garibaldis (Henry J. Garibaldi, Edith Canvin, Elvira Levaggi, Raymond Garibaldi and Clarence Garibaldi) obtained by a probate court decree. In that action, Petitioners maintained that J. Calvert Snyder, acting in his dual capacity as attorney for the Estate of Theresa Garibaldi and as attorney for Respondent Garibaldis, perpetrated a fraud upon the probate court and these Petitioners when he misrepresented the nature of, and the parties to, a certain Memorandum of Agreement, dated October 22, 1962. By reason of Snyder's fraudulent representations, Petitioners contended, the probate court erroneously believed that the agreement related in part to property which was properly included in the estate when, in fact, the estate, as a party to the agreement, waived any claim which it might have to said property. As a result, Petitioners submitted that the probate court erroneously assumed jurisdiction to construe and enforce the terms of that agreement. Secondly, Petitioners maintained that Respondent Garibaldis thereby acquired legal title to property to which they were not entitled because of their attorney's fraudulent conduct. The trial court found that J. Calvert Snyder and the Respondent

Garibaldis were not guilty of fraud. Petitioners took an appeal from that determination.

In affirming the trial court's judgment, the Third Appellate District, speaking through Justice Evans, did not decide the pivotal issue which Petitioners presented to that tribunal. The court recognized the fact that J. Calvert Snyder was the attorney for the administratrix and the five Garibaldi respondents. (See Appendix "A", page viii, lines 19-20) The appellate court also recognized the fact that J. Calvert Snyder's conduct may have constituted fraud. (See Appendix "A", page xvi, lines 24-26) However, the appellate court did not confront the question of whether or not there was substantial evidence in the record to support the trial court's finding that J. Calvert Snyder was not guilty of fraud. The court sidestepped this issue, stating that such a determination was unnecessary in view of the fact that there was no evidence in the record to indicate that the administratrix of the estate of Theresa Garibaldi or the Respondent Garibaldis, apart from the conduct of their attorney, personally perpetrated any fraud upon, or made any misrepresentation to, the probate court. In regard to the conduct of J. Calvert Snyder, the appellate court said on page xvi of its opinion:

> "Without recitation of other excerpts from the record of inconsistent statements made by Snyder to various courts on the intent and meaning of the agreement, suffice it to say that his acts and conduct are more than puzzling . . .
>
> ". . . The actions of Snyder may or may not constitute fraud upon which an order for compensatory damages could rest."

However, despite Snyder's conduct, the court concluded:

> "Our review of the record, however, fails to reveal fraud or misrepresentations perpetrated or made by the heirs of Theresa, or by the administratrix in her representative capacity. Under such circumstances, imposition of a constructive trust on the estate property distributed by a valid decree of distribution is not appropriate." (Opinion, p. xvi)

Thus, the appellate court in effect held that, although Respondent Garibaldis may have obtained property through the wrongful conduct of their attorney, a constructive trust could not be imposed upon that property in favor of those defrauded because Respondent Garibaldis did not personally perpetrate that fraud.

In their Petition for Rehearing to the Third Appellate District, attached hereto as Appendix "B", Petitioners contended that they had a right to have the appellate court rule on the question of the attorney's fraudulent conduct. (See Appendix "B", page xxiv, lines 17-32; page xxxiv, lines 15-18) Specifically, they maintained that, if the attorney's conduct amounted to fraud, such fraud was imputed to his clients by reason of established California case and statutory law. Hence, Petitioners were necessarily entitled to the relief which they sought, i.e., the imposition of a constructive trust on the real property which Respondent Garibaldis obtained by reason of their attorney's fraud. The appellate court denied the Petition for Rehearing on January 25, 1977. A copy of that decision is attached hereto as Appendix "C".

REASONS FOR ALLOWANCE OF WRIT

The guarantees of the Fourteenth Amendment to the Federal Constitution provide that the States are forbidden to deny any person within their jurisdiction the equal protection of the laws and that no person shall "be deprived of life, liberty or property without due process of law." These guarantees are binding on the judicial branches of a state government. Where the judgment of a state court is grossly and obviously in error and is in clear conflict with those fundamental principles which have been established for the protection and enforcement of private rights, the equal protection and due process clauses of the Federal Constitution enable the United States Supreme Court to review that state court judgment. *Roberts v. New York,* 295 U.S. 264, 79 L.Ed. 1429, 55 S.Ct. 689; *American R. Exp. Co. v. Kentucky,* 273 U.S. 269, 71 L.Ed. 639, 47 S.Ct. 353; *Corrigan v. Buckley,* 271 U.S. 323, 70 L.Ed. 969, 46 S.Ct. 521; *West v. Louisiana,* 194 U.S. 258, 48 L.Ed. 965, 24 S.Ct. 650; *Ladner v. Siegel,* 298 Pa. 487, 148 A. 699, 68 A.L.R. 1172.

Under California law, Petitioners have a constitutionally guaranteed right of appeal in all litigated matters within the express jurisdiction of the appellate court. *In re Sutter-Butte By-Pass Assessment No. 6* (1923) 190 Cal. 532, 213 P. 974, 975; *Pacific Telephone, etc., Co. v. Eshleman* (1913) 166 Cal. 640, 690, 137 P. 1119, 1138; California Constitution, Article 6, Section 4b; 4 Cal.Jur.3d 134, Appellate Review, §90. In the instant case, Petitioners' cause of action

in the trial court was based upon the fact that the Respondent Garibaldis, by reason of the fraudulent conduct of their attorney and agent, were themselves responsible for such fraudulent conduct. Petitioners' appeal to the Third Appellate District Court was premised upon the same legal principle. That legal principle, as it stood at the time of trial and as it now exists in California, provides that the fraudulent acts of an agent are imputed to his principal where the defrauded party seeks to impose a constructive trust on the property which the principal has acquired through his agent's fraud. *M.G. Chamberlain & Co. v. Simpson* (1959) 173 Cal.App.2d 263, 343 P.2d 438; *Eamoe v. Big Bear Land & Water Co.* (1950) 98 Cal.App.2d 370, 220 P.2d 408; *Wells Fargo Bank & Union Trust Co. v. Dowd* (1956) 139 Cal. App.2d 561, 294 P.2d 159; *Duarte v. Postal Union Life Insurance Co.* (1946) 75 Cal.App.2d 557, 171 P.2d 574; *Ghiglione v. American Trust Co.* (1942) 49 Cal.App.2d 633, 122 P.2d 301; *Brown v. Oxtoby* (1941) 45 Cal.App.2d 702, 114 P.2d 622; *Worthen v. Jackson* (1958) 139 Cal.App.2d 615, 293 P.2d 797. That rule is codified in §§2330 and 2338 of the California Civil Code.

By reason of this constitutionally guaranteed right of appeal, Petitioners were entitled, pursuant to the due process clause of the Federal Constitution, to have the Third Appellate District Court review their claim of error on the part of the trial court. They were entitled to have the appellate court rule on the issue of whether there was any substantial evidence in

the record to support the trial court's finding that J. Calvert Snyder did not perpetrate any fraud. Petitioners possessed such a right because, if J. Calvert Snyder's conduct could only be characterized as fraudulent, that conduct would necessarily be imputed to his clients, the Respondent Garibaldis. Thus, Petitioners would be entitled to an order of the trial court imposing a constructive trust on the property which the Respondent Garibaldis obtained through their attorney's fraud.

The Third Appellate District Court, in affirming the trial court's judgment, did not hold that the attorney, J. Calvert Snyder, was innocent of fraud. The appellate court did not conclude that there was any substantial evidence to support the trial court's judgment in this regard. Instead, the Third Appellate District Court held that it was unnecessary to decide the issue which formed the basis of Petitioners' cause of action and their appeal because Petitioners did not show that Respondent Garibaldis personally perpetrated any fraud. Thus, contrary to established California law, which still remains intact, the appellate court, in effect, held that an agent's fraudulent acts are not imputed to his principal who has derived a benefit by reason of that fraudulent conduct.

Such a holding is in error which is gross and obvious and amounts to an arbitrary and capricious exercise of power. Petitioners are entitled to have the California appellate court decide whether the attorney's conduct can only be characterized as fraudulent because, if so decided, Petitioners would be

entitled to have a constructive trust imposed on the property which Respondent Garibaldis obtained. The failure of the Third Appellate District to review the issue of whether substantial evidence existed to support the trial court's finding that the attorney was not guilty of fraud amounts to a denial of due process of law; while the failure to follow established California law which provides that an agent's acts are imputed to his principal for the purpose of imposing a constructive trust constitutes a denial of the equal protection of the laws.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated, Reno, Nevada,
April 1, 1977.

Respectfully submitted,
JOHN C. BARTLETT,
JAMES S. BEASLEY,
VARGAS, BARTLETT & DIXON,
Counsel for Petitioners.

(Appendices Follow)

APPENDICES

Appendix "A"

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

In the Court of Appeal
State of California
Third Appellate District
(Amador)

3 Civil 15956

Joseph J. Garibaldi, Leo E. Garibaldi and Leona D. Garibaldi, Plaintiffs and Appellants, vs. Edith Canvin, as Administratrix of the Estate of Theresa Garibaldi, Deceased; Edith Canvin, individually, Henry J. Garibaldi, Clarence Garibaldi, Raymond Garibaldi, Elvira Levaggi, James S. De Martini and J. Calvert Snyder, Defendants and Respondents.	(Super. Ct. No. 7767)
Henry J. Garibaldi, Edith Canvin, Elvira Levaggi, Raymond Garibaldi, and Clarence Garibaldi, Plaintiffs and Respondents, vs. Samuel D. Robinson, et al., Defendants, Joseph J. Garibaldi, Leo E. Garibaldi and Leona D. Garibaldi, Intervenors and Appellants.	(Super. Ct. No. 8468)

[Filed Jan. 5, 1977]

OPINION

This proceeding is a continuation of a property dispute between two warring factions of the heirs of Theresa Garibaldi. Theresa died in 1956, and her eight children have since been embroiled in what appears to be a continuing gusher of bitter litigation over her property.

In the second of two prior appeals, this court, in an unpublished opinion (3 Civ. 12727) filed August 11, 1972, narrated the pertinent factual background. It is here apropos and we quote:

"FACTUAL BACKGROUND

"Upon the death of Theresa Garibaldi, appellants sought probate of a holographic document claimed to be her will. Respondents filed a contest and on December 12, 1958 the instrument was denied probate upon a finding of undue influence by appellants. The judgment rejecting the purported will was affirmed on appeal. (Estate of Garibaldi (1961) 57 Cal.2d 108.)

"On January 7, 1959, approximately a month after the trial court had denied probate of the will, and pending appeal of that judgment, Edith Canvin, one of the five respondents, was appointed administratrix of decedent's estate (Action No. 3677). Meanwhile, on January 2, 1958 there had been recorded a 1949 deed, executed by the decedent, purporting to convey all her real and personal property[1] to the three appellants as joint tenants." Footnote 1 provides, "The total property had an aggregate value of approximately $700,000, consisting of three parcels of real property known as the Home Ranch, the River

Ranch, and the Mountain Properties, and cattle, bank accounts and other miscellaneous personal property."

"On January 20, 1959 the administratrix, confronted with the 1949 deed executed by decedent in favor of appellants, filed suit (Action No. 6071) against appellants in the Superior Court of Amador County alleging fraud and undue influence by appellants and seeking cancellation of the 1949 deed and the imposition of a constructive trust on the property for the benefit of decedent's estate.

"Action No. 6071 went to trial commencing September 17, 1962. After several weeks of trial, appellants and respondents executed on October 22, 1962 a memorandum of agreement (hereinafter the 'Agreement') whereby the eight heirs agreed to a plan of division and distribution of the property that was being litigated in the action. The Agreement provided that appellants would receive the Home Ranch, the River Ranch, all monies in the bank accounts, the cattle, stocks, bonds, securities, and all furnishings and equipment located on the Home Ranch. Respondents were to receive the Mountain Properties (subject to reservation of a life interest in a parcel thereof to appellant Leo Garibaldi).

"Although the Agreement recited the heirs' intent to settle the controversy being litigated in Action No. 6071 and to dispose of the properties the subject of the 1949 deed in accordance with the provisions of the Agreement, the trial of the action continued, and on November 19, 1962 the case was submitted for decision on briefs.

"On March 15, 1963 the administratrix moved to set aside the order of submission and to permit introduction of the Agreement as part of the record in Action No. 6071. On June 18, 1963 the superior court denied the motion to reopen and rendered its decision in the case. After expressing its opinion that decedent and the three appellants had, during decedent's lifetime, formed an oral partnership in all the 'ranches and cattle raising operations,' the court concluded that the 1949 deed was valid and had been effectively delivered without any improper procurement by appellants; found that the intent of the 1949 deed was to convey title to the properties in trust for a partnership composed of the three appellants and the decedent-grantor; that the three surviving partners (appellants) therefore owned an undivided three-quarters of the properties; and that the remaining one-quarter was vested in the estate of decedent. Judgment was duly entered July 28, 1964 and no appeal was taken therefrom.[2]" Footnote 2 provides, "The trial judge concluded his opinion with the following comment regarding the Agreement which the heirs had executed: 'Before closing this memorandum of opinion, the Court wishes to say that in connection with the motion to reopen the case which . . . is this day being denied, the Court has had occasion to examine an agreement in which the parties and their attorneys herein sought to settle this entire controversy by a division of the properties and bank accounts in question between the parties to this action. To the Court the agreement looks to be a very commendable one and it has no hesitation in recommending that it be carried out and any further expense or controversy herein be settled at once and for all time.'"

"On May 5, 1966 the administratrix filed in Action 3677 a petition for instructions and directions, pursuant to Probate Code sections 588 and 1020.1, seeking validation of the 1962 Agreement as a contract among the heirs which would control disposition of the disputed property as against the judgment (to the extent it was inconsistent with the terms of the Agreement) entered in Action No. 6071. Appellants filed a counter-petition for determination of entitlement to distribution of the estate (Prob. Code, § 1080), asking 'that the Court determine who are entitled to distribution of said estate;' and seeking a decree 'that said property be distributed in accordance with the terms of [the] judgment rendered in Amador County Superior Court Action No. 6071.'

"The respective petitions were heard together on July 14, 1966. Appellants challenged the probate court's jurisdiction to determine the validity of the Agreement, and attacked the validity of the Agreement itself. On December 12, 1966 (and by a supplemental order filed January 6, 1966), the court filed its decision rejecting the jurisdictional argument, finding that it had jurisdiction to hear and determine all issues presented in the opposing petitions; that the heirs had intended the 1962 Agreement to govern the division and distribution of all the real and personal properties irrespective of the judgment in Action No. 6071 and irrespective of what assets were included or

excluded from the estate by that judgment;[3] that the Agreement was supported by adequate consideration; that respondents had performed their part of the Agreement but appellants had not; that the Agreement had not been abandoned by the parties; and that the Agreement was binding on the parties as heirs or otherwise.'" Footnote 3 provides, "At the July 1966 hearing which preceded this decision, testimony was received as to discussions among counsel representing the parties in Action No. 6071 which indicated their belief that a judgment would have to be entered in that action because of certain tax consequences, and in order to avoid trying the entire matter again in the tax court." Footnote 4 provides, "Because of the significance of the court's findings as to the Agreement in relation to our later discussion, we set out the key portion of the findings in some detail. The court found that the Agreement was 'executed with the intent, on the part of all of the parties thereto, to accomplish thereby the division and method of distribution of the assets of this estate and the associated properties thereto, the assets of this estate being whatever the Court might determine, in said Action No. 6071, were the assets of said estate (This was subsequently determined to be an undivided one-fourth in said real and personal property.), and the associated properties, being the remaining undivided interest in said real and personal property, if any, (This was subsequently adjudicated to be an undivided three-fourths interest therein.); and, with the further intent upon the part of said heirs that such Agreement and Supplement were to constitute a written consent by

all of the heirs to the distribution of the assets of said estate as in such Agreement and Supplement provided, and a partition by agreement of all of the properties involved irrespective of whether said properties were found to be assets of said estate or not in said Action No. 6071 and in any judgment that might be subsequently entered therein. It was the intent of all of the heirs that such Agreement and Supplement were to fully and finally determine the manner of distribution and partition of the entire property covered thereby, whether as an asset of the estate or otherwise.' (Parenthesis in original.)"

"By its order last mentioned, the court directed that the assets of the estate (i.e., the undivided one-fourth interest in decedent's property), be distributed in accordance with the Agreement and directed the administratrix to prepare and file her final report and petition for distribution of the estate accordingly. The court further ordered that appellants execute in favor of respondents the necessary conveyances of respondents' agreed interests in the properties excluded from the estate (i.e., the undivided three-fourths interest) to respondents, and reserved jurisdiction, 'in accordance with the rules and practices of Equity,' to require such conveyances as were necessary to complete enforcement of its order.

"Appellants thereafter appealed from the court's determination."

In the present proceeding, the appellants Joseph, Leo and Leona Garibaldi once again attack the judgment of the probate court in Action No. 3677 of

Amador County and the opinion of this court (3 Civ. 11731) filed October 28, 1968, holding that an agreement signed by each appellant and respondents during the trial of Action No. 6071 in the Superior Court of Amador County had not been abandoned and was intended to govern distribution of the estate. The complaint filed by appellants, reduced by demurrer to two counts which alleged fraudulent conduct by respondents prior to execution of the agreement, sought the imposition of a constructive trust on any properties received by the respondents as a consequence of the probate court's decree based upon the agreement. The trial court failed to find fraud or misrepresentation and denied the relief requested.

Appellants named as defendants, Edith Canvin, individually and as administratrix of the estate of Theresa Garibaldi, Henry J. Garibaldi, Clarence Garibaldi, Raymond Garibaldi, and Elvira Levaggi (all children and heirs of Theresa), and their attorneys J. Calvert Snyder, Harry Mazzera, deceased, and James DeMartini, individually and as partners in the firm of Mazzera, Snyder and DeMartini.

Appellants now contend that (1) the probate court in proceeding 3677, Amador County, did not acquire jurisdiction to determine the validity of the memorandum of agreement; and (2) that the trial court's findings that respondents did not commit acts of fraud in securing appellants' signatures to the memorandum of agreement, and that appellants were given a full and fair hearing in probate proceeding 3677, are not supported by substantial evidence.

I

The first contention has been previously disposed of by this court in 3 Civil 12727 and is therefore res judicata. In that proceeding, appellants challenged the probate court's jurisdiction to determine the validity of the agreement. In the unpublished opinion filed August 11, 1972 (3 Civ. 12727), the following determination was made:

"On appeal, this court in an unpublished opinion filed October 28, 1968,[5] held that the probate court had jurisdiction to make the order under attack." Footnote 5 provides, "Estate of Theresa Garibaldi, also known as Teresa Garibaldi, and Mrs. Peter Garibaldi, Deceased—Joseph J. Garibaldi, et al., v. Henry Garibaldi, et al., 3 Civil 11731, hereinafter referred to simply as 'Garibaldi.' (Hg. den. December 24, 1968.)" "We pointed out that the general rule denying the probate court jurisdiction to pass upon contentions of parties claiming adversely to an estate in probate is subject to well-recognized exceptions, and that '[w]hen a superior court sittting in probate has jurisdiction over one aspect of a claim to property, it may determine all aspects of the claim; it may determine whether a transfer of the interest of an heir, legatee or devisee to a third party is valid and order distribution accordingly. (Estate of Baglione, 65 Cal.2d 192, 196-197.) Where such an agreement embraces property both within and outside the estate, the probate court has jurisdiction to decide the validity of the entire agreement; once its jurisdiction attaches, it extends to the determination of all

questions of law and fact, the decision of which is ancillary to a proper judgment in the case. (Estate of Stanley, 34 Cal.2d 311, 318-320.) (Fn. omitted.)' (*Ibid.*, Unpublished Opinion, p. 5.)

"We further emphasized that the Agreement 'encompassed numerous items of real and personal property, undivided interests in all these items being simultaneously within and outside the estate. The proposed transfers and exchanges created an indissoluble arrangement, ill suited to dispersal between two tribunals. As an arrangement among the heirs affecting distribution of the estate, its interpretation and enforcement were within the jurisdiction of the probate court. Once its jurisdiction attached, the probate court had power to determine the entire matter, even to the extent of ordering the parties to convey assets outside the estate.' (*Id.*, p. 6.)"

The contention reasserted on this appeal is without merit for the reasons previously stated by this court. (3 Civ. 12727; 3 Civ. 11731.)

In addition to the jurisdictional challenge, appellants assert a lack of notice at the time of the motion and hearing in probate court (action 3677), citing as authority Probate Code section 1020.1.[1]

[1]Probate Code section 1020.1 provides in pertinent part:
"The court before making distribution of any property of a decedent to any assignee . . . of any heir, . . . or before making distribution to any person other than an heir, devisee, . . . pursuant to any agreement, request or instructions of any heir, devisee or legatee . . . may on the motion of any person interested . . . or on its own motion inquire into the consideration for such assignment, transfer, agreement, request or instructions . . . and into the circumstances surrounding the execution of such . . . agreement, . . . Notice of a hearing on any motion made pursuant to this section shall be served personally or by registered mail as the court may direct at least 10 days before the hearing . . . ."

The original petition for instructions filed on behalf of the estate relied upon Probate Code section 588, which authorizes the court to instruct the executrix or administratrix as to disposition of an estate. At the hearing on June 9, 1966, Attorney Snyder sought and was granted leave to amend the motion to include a petition for instructions under Probate Code section 1020.1 in order to eliminate any question of the court's jurisdiction to determine the effect of the memorandum agreement. As amended, the motion was granted. At the June 9th hearing, plaintiffs were represented by counsel. The hearing was continued to July 14, 1966, at which time plaintiffs were represented by three attorneys, each of whom made arguments that the court lacked subject matter jurisdiction to determine the effect of the agreement under either Probate Code section 588 or section 1020.1. They did not attack the court's jurisdiction for lack of adequate notice. By their appearance, their participation in the hearing on the motion and failure to object for lack of notice, appellants waived their objections. "Just as noncompliance with the jurisdictional requirement of service of process may be cured by a general appearance of the *party* in the *action* . . . the less serious defect of failure to serve proper notice of motion may be cured by the appearance of *counsel* and his participation in the *hearing* without objection. (*Estate of Pailhe* (1952) 114 C.A.

2d 658, 661 . . . .)" (Emphasis in original.) (4 Witkin, Cal. Procedure (2d ed. 1971) Proceedings Without Trial, § 7, p. 2683; see also Farrar v. McCormick (1972) 25 Cal.App.3d 701, 705.)

The purpose of the notice requirement is to assure that those affected have knowledge of the motion and opportunity to appear. That purpose was here satisfied by the appearance of counsel for appellants at the hearing. The contention asserted is without factual or legal support and must be rejected.

II

Appellants assert insufficiency of the evidence to (a) support the trial court's finding that the respondents did not commit acts of fraud or misrepresent facts to appellants; and (b) that appellants had a full and fair hearing in the probate proceedings. (Action 3677, Amador County.) In resolving this issue, we are bound by the established rule that all factual matters will be viewed most favorably to the prevailing party and in support of the judgment. (Nestle v. City of Santa Monica (1972) 6 Cal.3d 920, 925.)

Appellate courts ordinarily look only at the evidence supporting the successful party and disregard the contrary showing. (6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 249, p. 4241.) All conflicts therefore must be resolved in favor of the findings and judgment. (Nestle v. City of Santa Monica, supra, 6 Cal.3d at pp. 925-926; Crawford v. Southern Pacific Co. (1935) 3 Cal.2d 427, 429.)

The appellants argue that Attorney J. Calvert Snyder acted fraudulently in proceeding 3677, Amador County. At the hearing on the motion for instructions, Snyder represented to the court that the controversial agreement executed during trial of action 6071 (the quiet title proceeding in Amador County) was, in fact, intended as a consent to distribution in the estate, rather than an agreement intended to settle the quiet title action. Appellants point out that previously, Snyder, in a letter to a different court (Judge Airola in action 6071), categorized the document as an attempted settlement agreement which failed, and entreated the court to proceed with the trial to a conclusion. The letter addressed to Judge Airola, dated December 30, 1963, stated in part, "We had been hopeful that all of these formalities would have been settled some time ago, but we have gotten no cooperation in this litigation from the Defendants, Joseph J. Garibaldi, Leo S. Garibaldi, and Leona D. Garibaldi. Their attorneys, I am sure, have been doing everything in their power to complete the settlement, but to no avail. We have finally concluded, even though contracts purporting to settle the litigation have been entered into, that this matter will never be concluded by settlement, and that we must, therefore, press for an early conclusion of the litigation." The court thereafter proceeded with the trial, culminating with the rendition of judgment. Following judgment, Snyder commenced contempt proceedings against the appellants in order to enforce the judgment. No appeal was taken from the decision in proceeding 6071.

After judgment, Snyder settled a federal estate tax dispute in the tax court on the basis of the judgment rather than on the division of property proposed by the agreement. In this latter connection, Snyder caused to be prepared and filed during trial of action 6071 an inventory with the probate court which stated in part:

"I. REAL PROPERTY:

"Interest in the following described parcels of real property, the nature and extent of which will be determined either in litigation or by settlement thereof: (SEE: Action No. 6071 pending in the Superior Court of the State of California, County of Amador, entitled: EDITH CANVIN, as Administratrix of the Estate of Theresa Garibaldi, Deceased, Plaintiff [versus] JOSEPH J. GARIBALDI, LEO E. GARIBALDI and LEONA D. GARIBALDI, Defendants.)"

Appellants argue that in spite of Snyder's representations to Judge Airola that the agreement was a settlement agreement, and his compromise of the tax dispute based upon the judgment in 6071 rather than the attempted settlement, he later referred to the agreement in an appearance before Judge Huberty on the motion for instructions, not as a settlement attempt, but rather as a consent to distribution. At the hearing on the motion for instruction, Snyder stated to the court: "No, your Honor, my opinion is this: The evidence is before the Court on the issues and it seems to be quite clear. Is this not a consent to distribution of the estate; the estate's position is

that it is, that it is a consent to distribution. The estate was not a party to the action and it was made by the heirs and it was made in accordance to our affidavit and with the knowledge and understanding that the other matter would proceed to judgment. . . . I think Mr. Lewis is overlooking the fact that the agreement couldn't settle the law suit. The law suit is between the estate and the heirs. The estate is not a party to this agreement as it was never submitted to the Court for approval and I know it was made with the intention that the property would be distributed in accordance to the agreement.

"MR. LEWIS: The intentions are in the body of that agreement, your Honor, and Mrs. Canvin signed that agreement as the Administratrix of the Estate of Garibaldi.

"MR. SNYDER: Just a minute, Counsel.

"MR. POTTS: As an individual and in a representative capacity."

Appellants argue that Snyder's statements to the probate court that, "The estate was not a party to the action" and that "The estate is not a party to this agreement" were fraudulent misrepresentations inasmuch as proceeding 6071, Amador County, was in fact instituted by Edith Canvin as the administratrix of the estate of Theresa Garibaldi; and during the attempted settlement of 6071, Snyder caused a paragraph to be added to the settlement agreement making the administratrix a party to the agreement in her representative as well as individual capacities as an heir.

Without recitation of other excerpts from the record of inconsistent statements made by Snyder to various courts on the intent and meaning of the agreement, suffice it to say that his acts and conduct are more than puzzling.

Our review of the record, however, fails to reveal fraud or misrepresentations perpetrated or made by the heirs of Theresa, or by the administratrix in her representative capacity. Under such circumstances, imposition of a constructive trust on the estate property distributed by a valid decree of distribution is not appropriate.

On two prior occasions, this court has concluded that notwithstanding Snyder's inconsistent actions, verbal and otherwise, relating to the agreement, it was in fact intended by the parties to be a consent to distribution. In the absence of evidence of actionable fraud on the part of the Garibaldi heirs, the distribution of the property was not only proper but was made pursuant to a valid and final judgment. (Ferguson v. Ferguson (1943) 58 Cal.App.2d 811, 813; Stevens v. Torregano (1961) 192 Cal.App.2d 105, 115.)

Actionable fraud by the heirs of Theresa has not been disclosed by the evidence presented. The actions of Snyder may or may not constitute fraud upon which an order for compensatory damages could rest. The complaint fails to seek money damages for such acts of fraud. We do not here impute malice or fraud to the attorneys, since the record is without evidence

that the character of Snyder's conduct was argued to the trial court in that context.

It is hoped and intended by this opinion that a final armistice will be declared as it relates to the battle over the property of Theresa. We conclude that with the exception of the fraud asserted here, each issue raised has been laid to rest by the prior proceedings (3 Civ. 11731 and 3 Civ. 12727) and are here determined to be res judicata. We additionally find a total absence of fraud on the part of the heirs upon which a constructive trust could be predicated, and that the record of the proceedings held on the motion for instructions relating to the distribution of the estate resulted in a full and fair hearing to each of the parties, at which time their respective contentions were fully presented and ultimately determined.

The judgment is affirmed.

Evans, J.

We concur:

Friedman, Acting P.J.

Regan, J.

Appendix "B"

3 Civil No. 15,956

In the Court of Appeal of the State of California

THIRD APPELLATE DISTRICT

Appeal from the Superior Court of Amador County

JOSEPH J. GARIBALDI, LEO S. GARIBALDI and LEONA D. GARIBALDI,
Plaintiffs and Appellants,
vs.
EDITH CANVIN, as Administratrix of the Estate of Theresa Garibaldi, Deceased, et al.,
Defendants and Respondents.

HENRY J. GARIBALDI, EDITH CANVIN, ELVIRA LEVAGGI, RAYMOND GARIBALDI, and CLARENCE GARIBALDI,
Plaintiffs and Respondents,
vs.
SAMUEL D. ROBINSON, et al.,
Defendants and Respondents.

JOSEPH J. GARIBALDI, LEO S. GARIBALDI, and LEONA D. GARIBALDI,
Interveners.

COMBINED MOTIONS FOR CLARIFICATION AND AUGMENTATION OF RECORD AND PETITION FOR REHEARING

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3 Civil No. 15,956

In the Court of Appeal of the State of California

THIRD APPELLATE DISTRICT

Appeal from the Superior Court of Amador County

JOSEPH J. GARIBALDI, LEO S. GARIBALDI and LEONA D. GARIBALDI,
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vs.
SAMUEL D. ROBINSON, et al.,
Defendants and Respondents.

JOSEPH J. GARIBALDI, LEO S. GARIBALDI, and LEONA D. GARIBALDI,
Interveners.

COMBINED MOTIONS FOR CLARIFICATION AND AUGMENTATION OF RECORD AND PETITION FOR REHEARING

INTRODUCTION

Appellants petition the Honorable Court of Appeal of the State of California, Third Appellate District, for a rehearing. Said petition for rehearing is based on the ground that this Honorable Court, in formulating its opinion of January 5, 1977, whereby the lower court's judgment was affirmed, committed a substantial error of law, perhaps caused by a misunderstanding of certain facts. In particular, this Court, in effect, erroneously held that the Respondents (Henry J. Garibaldi, Edith Canvin, Elvira Levaggi, Raymond Garibaldi and Clarence Garibaldi—hereinafter referred to as Respondent Garibaldis) were entitled to retain property which they had acquired by a probate court judgment *even though* that judgment had been obtained through the fraud of their attorney and agent, Respondent J. Calvert Snyder. Thus, this Honorable Court enunciated the doctrine that a principal is not responsible for the fraudulent acts of an agent which are committed during the course of the agency relationship. Such a holding is in conflict with all established legal decisions. It also precluded Appellants from receiving this Court's determination on the pivotal issue raised by their appeal. This court did not determine whether, as Appellants argued, there was no substantial evidence in the record to support the trial court's finding that Respondent J. Calvert Snyder, as the attorney for the remaining Respondents, did not perpetrate a fraud upon the probate court when he testified that the Estate of Theresa Garibaldi was not a party to the October 22, 1962 Memorandum of Agreement.

I

APPELLANTS REQUEST CLARIFICATION OF THIS COURT'S OPINION

At the outset, Appellants request that this Court clarify that portion of its opinion which states on page 18:

> "We do not here impute malice or fraud to the attorneys, *since the record is without evidence that the character of Snyder's conduct was argued to the trial court in that context.*" (Emphasis Added)

If, by this language, the Court was setting forth the fact that Appellants did not ask the trial court to give them a money judgment as damages for Respondent Snyder's fraudulent conduct, then this Court is correct. On the other hand, if this Court meant to say that Appellants did not assert in the trial court that the imposition of a constructive trust was proper because Respondent Snyder's fraudulent conduct was imputed to his clients, the Administratrix and Respondent Garibaldis, this Court is laboring under a factual misunderstanding which severely prejudices Appellants.

The gist of Appellants' action for the imposition of a constructive trust on the property received by the Respondent Garibaldis was premised solely on the attorney-client, the principal-agent relationship which existed between Respondent J. Calvert Snyder and Respondent Garibaldis. The thrust of Appellants' lawsuit against Respondent Garibaldis was that Respondent J. Calvert Snyder was acting in place of the Administratrix and Respondent Garibaldis when he

fraudulently misrepresented the nature of the October 22, 1962 Memorandum of Agreement to Judge Huberty. Proof of actual personal involvement on the part of the Administratrix and Respondent Garibaldis was not possible for none of these Respondents ever uttered a word before Judge Huberty. Every argument, every statement, every piece of testimony presented in opposition to Appellants' contention that the Estate of Theresa Garibaldi was a party to the October 22, 1962 Memorandum of Agreement came from either the mouth or pen of Respondent J. Calvert Snyder. Under such circumstances, it was sufficient to establish the Respondent J. Calvert Snyder was the attorney and agent of Respondent Garibaldis and that he perpetrated a fraud upon the probate court.

However, in this regard, it must be pointed out that this Court's statement that:

> "Our review of the record, however, fails to reveal fraud or misrepresentations perpetrated or made . . . by the administratrix in her representative capacity."

is *factually incorrect.* It was Edith Canvin, *as Administratrix of the Estate of Theresa Garibaldi,* who petitioned the probate court for its order directing the estate to be distributed in accordance with the supposed "Settlement and Consent to Distribution Agreement." Clerk's Transcript on Appeal, Vol. III, p. 840. It was also Respondent J. Calvert Snyder, in his capacity as attorney for the Administratrix (Clerk's Transcript on Appeal, Vol. III, p. 854, l. 24 through p. 855, l. 2; p. 858, ls. 21-22), and, thus acting in her place, who testified on the stand and by affidavit that the estate was not a party to the October 22, 1962 Memorandum of Agreement and that the Agreement was "an expression of the intent and consent to distribution and partition of the properties involved as between the parties involved, irrespective of whether said properties were found to be assets of said estate or not." Clerk's Transcript on Appeal, Vol. III, p. 855, l. 26 through p. 856, l. 4.

The fact that Appellants' cause of action was founded upon the relationship which existed between Respondent J. Calvert Snyder and Respondents is more than amply supported by the record—for instance, Appellants' Complaint (Clerk's Transcript on Appeal, Vol. I, p. 173, l. 25 through p. 174, l. 11), and the examination of Respondent J. Calvert Snyder at trial alone. However, conclusive evidence of this fact can be discerned from a reading of the Opening Argument which Appellants filed with the trial court. There, at Page 3, lines 21-25, Appellants argued:

> "If an advocate practices a deceit upon his adversary by means of a misrepresentation neither the fraudulent party *nor his clients, who would benefit from such deceit, should be allowed to retain the benefits derived.*" (Emphasis added)

and at page 3, line 32 through page 4, line 6, Appellants pointed out:

> "While an attorney is under a duty to protect his client's interests, he is under an equally imperative obligation to aid the court in avoiding

error and in determining the cause in accordance with justice and established rules of practice. *Where an attorney leads the court into error, his client is not entitled to favors within the court's discretion.*" (Emphasis added)

Further support can be found in the Objections to Proposed Conclusions of Law and Proposed Corrections which Appellants filed on September 19, 1975, in the trial court. Accordingly, if the above cited language of this Court is intended to mean that Appellants did not argue in the trial court that Respondent Snyder's acts were imputed to the Administratrix and Respondent Garibaldis, Appellants would ask this Court to augment the record on appeal with these pleadings so as to make the record conform to the truth. See, Witkin, *California Procedure,* 2nd Ed., Vol. 6, Appeal, §412, pp. 4380-4381 and cases cited therein.

II

THIS APPELLATE COURT OVERLOOKED THE FACT THAT RESPONDENT SNYDER'S FRAUD IS IMPUTED TO RESPONDENT GARIBALDIS

In reading this Court's Opinion, it appears as if the Court concluded that a constructive trust could not be imposed on the property which Respondent Garibaldis received under the probate court judgment because there was no evidence in the record that these five Respondents *personally* perpetrated any fraud upon, or made any misrepresentation to, Judge Huberty. In this regard, this Honorable Court said:

"Our review of the record, however, fails to reveal fraud or misrepresentations perpetrated or made by the heirs of Theresa, or by the Administratrix in her representative capacity. Under such circumstances, imposition of a constructive trust on the estate property distributed by a valid decree of distribution is not appropriate."

In almost the same breath, however, this Court recognized the inherent improbability of Respondent Snyder's testimony and the fact that he may have been guilty of fraud where it stated:

"Without recitation of other excerpts from the record of inconsistent statements made by Snyder to various courts on the intent and meaning of the agreement, suffice it to say that his acts and conduct are more than puzzling . . .

". . . The actions of Snyder *may or may not constitute fraud* upon which an order for compensatory damages could rest." (Emphasis added)

A comparison of these two extracts from the Court's opinion clearly brings to light the legal inconsistencies and error contained in the decision. On the one hand, the Court suggests that the attorney for the Respondent Garibaldis, Respondent J. Calvert Snyder, may have been guilty of fraud and malice in the course of his representation of his clients; and yet, on the other hand, the Court disregards the fraudulent conduct of Respondent Garibaldis' attorney in concluding that a constructive trust may not be imposed on the property which Respondent Garibaldis obtained by reason of this same fraudulent conduct. The Court's

decision constitutes a legal anomaly which cannot withstand careful scrutiny.

In order to be entitled to the trial court's judgment imposing a constructive trust on the property which Respondent Garibaldis acquired through the fraudulent acts of their attorney and agent, Appellants were not required to prove that Respondent Garibaldis, themselves, personally perpetrated a fraud on the probate court. Appellants would be entitled to such a judgment if they established that Respondent Garibaldis' attorney and agent committed such a fraud. It is this principle which this Honorable Court overlooked in reaching its decision. It is set forth in Section 263 of the *Restatement of the Law,* 2d, Agency, as follows:

> "Unless he has changed his position, *a principal whose servant or other agent has fraudulently acquired property for him, holds it subject to the interests of the defrauded person.* If the principal is liable in tort for the fraud of the agent, his change of position after acquiring the property is not a defense." (Emphasis added)

Here, as a matter of law, Respondent J. Calvert Snyder was the agent of the Administratrix of Theresa Garibaldi's estate on account of his position as attorney for the estate. (See, 7 Cal.Jur.3d, Attorneys at Law, Section 216 et seq., page 525 et seq.; Restatement of the Law, 2d, Agency, Section 1(e) page 11.) In addition, he was the agent of Respondent Garibaldis inasmuch as he had been retained by them and been guaranteed payment of $50,000 for his at-

tempt to recover the property which Theresa Garibaldi had transferred to Appellants by deed. (See, Appellants' Opening Brief, p. 3, ls. 18-27; p. 8, l. 27 through p. 9, l. 2). Because of the existence of this agency relationship and the applicability of the general rules of agency (See, 7 Cal.Jur.3d, Attorneys at law, § 216, pp. 525-526), the fraudulent conduct of Respondent J. Calvert Snyder is imputed to the Administratrix and to Respondent Garibaldis. Thus when Respondent J. Calvert Snyder falsely stated that the estate was not a party to the October 22, 1962 Memorandum of Agreement and that the agreement was not intended to end Action 6071, those misrepresentations became the misrepresentations of his clients—the Administratrix and Respondent Garibaldis—as a matter of law.

In view of these circumstances, the requisite evidence of fraud upon which a constructive trust should be predicated does exist. Principals, such as Respondent Garibaldis, cannot insulate themselves from liability or shield themselves from the ability of a defrauded party to obtain the imposition of a constructive trust merely by having their agent do their dirty work. If this Court's present position is accepted, a principal could, with impunity, have his attorney lie, steal and cheat for him and retain the benefits derived from his agent's wrongful conduct. Such a holding, in itself, amounts to a travesty of justice which cannot be sanctioned or countenanced in any civilized social order.

III

APPELLANTS ALSO SOUGHT TO IMPOSE A CONSTRUCTIVE TRUST ON PROPERTY WHICH RESPONDENT J. CALVERT SNYDER RECEIVED BECAUSE OF HIS OWN FRAUDULENT ACTS.

In brief, the error which this Honorable Court committed is that it closed its eyes to the fact that Respondent Snyder's actions were necessarily imputed to his clients. This Court treated Respondent J. Calvert Snyder and Respondent Garibaldis as completely separate and distinct defendants. If Respondent J. Calvert Snyder was not the attorney and agent of the Administratrix and the Respondent Garibaldis, the opinion would bear some semblance of validity. However, in view of the fact that Respondent J. Calvert Snyder's conduct becomes that of his clients, the Court's determination that the imposition of a constructive trust was improper is *simply wrong.*

Even if this principle were not applicable, this Court's opinion would be in error for another reason. In addition to asking the trial court to impose a constructive trust on the property which Respondent Garibaldis received as a result of Respondent Snyder's fraud, Appellants requested the trial court to impose a constructive trust on that property which Respondent Snyder and his law firm held as the assignee of Clarence Garibaldi (See Clerk's Transcript on Appeal, Vol. I, p. 159, ls. 10-23; p. 172, ls. 5-7; p. 178, ls. 13-26) and which they similarly acquired as a result of Respondent Snyder's misrepresentations. In view of Respondent Snyder's direct

participation in, and gain from, his own fraudulent conduct, Appellants submit that resolution of the issue of whether any evidence exists to support the trial court's finding that Respondent Snyder was not guilty of fraud is imperative.

IV

CONCLUSION

In conclusion, Appellants ask this Honorable Court to recognize the legal impropriety of its decision. The question of whether Respondent J. Calvert Snyder's representations to Judge Huberty were fraudulent was never presented to this Court, except by this present appeal. In proceedings 3 Civ. 11731 and 3 Civ. 12727, this Appellate Court was not asked to decide that question, but was instead asked to determine whether the probate court's holding that the Estate of Theresa Garibaldi was not a party to the October 22, 1962 Memorandum of Agreement was supported by substantial evidence in the record. This Court held that such evidence did exist. *That evidence was Respondent J. Calvert Snyder's misrepresentations to the probate court.* Thus, in this present proceeding for the imposition of a constructive trust because of Snyder's fraud, the finding that the October 22, 1962 Memorandum of Agreement "was in fact intended by the parties to be a consent to distribution" (Court's Opinion, page 17), is not res judicata. As was stated in *Campbell-Kawannanakoa v. Campbell,* 152 Cal. 201, 92 P. 184, 187:

> "This character of relief is very common in the matter of fraudulent probate proceedings. The order or decree from the effect of which relief is sought cannot constitute a bar to such equitable action. As has been said, it is solely because of the order or decree, collaterally unassailable and valid on its face, that the equitable jurisdiction is necessary and exists."

Because the conduct of Respondent J. Calvert Snyder is imputed to his clients—the Administratrix and Respondent Garibaldis, this Court's suggestion that a constructive trust could be imposed on the property which Respondent Garibaldis received *only if* Respondent Garibaldis *personally* perpetrated a fraud amounts to legal error. A duty is imposed upon this Court to decide whether, as Appellants have argued throughout their briefs, Respondent J. Calvert Snyder's conduct can only be characterized as fraudulent. Appellants believe that this Court, after examining his acts and conduct, can only conclude that those acts and conduct were not just "puzzling", but that his representations to Judge Huberty were fraudulent. In such circumstances, a constructive trust should be imposed not only on the property which Respondent J. Calvert Snyder obtained by reason of his fraud, but also on that property which his clients also received *and for which they guaranteed Respondent J. Calvert Snyder the sum of $50,000. Campbell-Kawannanakoa v. Campbell,* supra; *Estate of Cecala,* 104 Cal.App.2d 526, 232 P.2d 48; *Ferguson v. Ferguson,* 58 Cal.App.2d 811, 137 P.2d 735; *Purinton v.*

Dyson, 8 Cal. 2d 322, 327; 65 P.2d 777, 113 A.L.R. 1230; *Estate of Ross,* 180 Cal. 651, 182 P. 752; *Security-First Nat. Bk. of Los Angeles v. Superior Court,* 1 Cal.2d 749, 37 P.2d 69; *Sohler v. Sohler,* 135 Cal. 323, 67 P. 282; *Thayer v. Fish,* 49 Cal.App.2d 618, 122 P.2d 358; *Simonton v. Los Angeles Trust & Sav. Bank,* 192 Cal. 651, 221 P. 368; *Wingerter v. Wingerter,* 71 Cal. 105, 11 P. 853. To do otherwise would be to convert this legal system, as to Appellants, into an instrument of injustice and oppression.

Dated this 13th day of January, 1977.

VARGAS, BARTLETT & DIXON
By /s/ JAMES S. BEASLEY
Attorneys for Appellants
201 West Liberty Street
Reno, Nevada 89501

AFFIDAVIT OF SERVICE BY MAIL

(Must be attached to original or a true copy of paper served)

No. 3 Civil 15956

State of Nevada,
County of Washoe—ss.

Ruth A. Ratkoviak, being sworn, says that he is a citizen of the United States, over 21 years of age, a resident of Washoe County, and not a party to the within action.

This affiant's residence (business) address is 201 West Liberty Street, Reno, Nev.

That affiant served a copy of the attached Combined Motions for Clarification and Augmentation of Record and Petition for Rehearing by placing said copy in an envelope addressed to Mazzera, Snyder & De Martini, at his office (residence) address 115 North Sutter Street, Stockton, California; Howard S. Dattan, Esq., 2067 First Avenue, San Diego, California which envelope was then sealed and postage fully prepaid thereon, and thereafter was on January 17, 1977, deposited in the United States mail at Reno. That there is delivery service by United States mail at the place so addressed, or regular communication by United States mail between the place of mailing and the place so addressed.

/s/ Ruth A. Ratkoviak

Subscribed and sworn to before me on January 17, 1977.

/s/Elaine Murray

Notary Public in and for said County and State.

My Commission Expires September 9, 1980.

(Seal)

Elaine Murray

Appendix "C"

In the Court of Appeal
State of California
Third Appellate District

3 Civil 15956
Amador 7767 & 8468

Joseph J. Garibaldi
vs.
Edith Canvin

[Filed Jan. 25, 1977]

BY THE COURT:

Appellants' motions for clarification and augmentation of record and petition for rehearing are denied. Dated: January 25, 1977.

Friedman, Acting P. J.

cc: Vargas, Bartlett & Dixon
Attorneys at Law
201 W. Liberty St.
Reno, Nevada 89504

cc: Howard S. Datton
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2067 First Ave.
San Diego, CA. 92101

cc: Mazzera, Snyder & DeMartini
Attorneys at Law
115 North Sutter St.
Stockton, CA. 95202

Appendix "D"

Order Due
March 4, 1977

ORDER DENYING HEARING

After Judgment by the Court of Appeal
3rd District, Division—, Civil No. 15,956

In the Supreme Court of the State of California

In Bank

Garibaldi et al.,
Plaintiffs and Appellants
v.
Canvin, As Administratrix, etc., et al,
Defendants and Respondents;

Garibaldi et al.,
Plaintiffs and Respondents
v.
Robinson et al.,
Defendants;
Garibaldi et al.,
Intervenors and Appellants.

[Filed Mar. 3, 1977]

Appellants' petition for hearing DENIED.

Tobriner
Acting Chief Justice